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No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALAN J. KARCHER, *et al.*,
Appellants,

v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF APPELLANTS

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I.

Appellees assert that the decision of the current leadership of the New Jersey Legislature to "withdraw" this appeal "ended the case or controversy upon which this Court's jurisdiction hinges." Appellees' Brief 12. But the basis of Appellant Karcher's Article III standing is not so fragile. Appellees ignore the fundamental difference between a *plaintiff's* standing to bring a lawsuit in the first instance and a *defendant's* standing to defend it on appeal. They also have failed to recognize the appropriate disposition of this case, under *United States* v. *Munsingwear*, 340 U.S. 36 (1950), if this Court holds that there is no longer a case or controversy between the parties.

1. In an analysis of the standing of a defendant, it is necessary, at the outset, to recognize the critical distinction between *constitutional* limitations on standing

and the *prudential* constraints in the standing doctrine, a distinction that Appellees ignore.[1] See *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975); *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982); *United States* v. *Richardson*, 418 U.S. 166, 188-97 (1974) (Powell, J., concurring). In the present case, the mere passage of time and a fortuitous shift in the State's legislative majority have operated to change Appellant's status in the eleventh hour of this lengthy litigation. Appellants submit that, under these unique circumstances, this Court should hold that Karcher[2] has standing to *continue to defend* the statute at issue if the Court finds that the minimum *constitutional* requirements of Article III continue to be satisfied.

Although prudential considerations might require a different result if Appellants attempted to assert such standing in the initiation of litigation, normal prudential concerns for limiting plaintiffs' standing are inapplicable in the present case, because only the standing of a *de-*

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[1] For example, Appellees argue that Karcher's injury is only a generalized grievance "shared by all citizens equally." Appellees' Brief 11. Even assuming arguendo that Karcher's claim was properly characterized as a "generalized grievance"—which it is not—the rule that a "generalized grievance" alone "normally does not warrant exercise of jurisdiction" is a *prudential* limitation on standing, not a constitutional barrier. See *Warth* v. *Seldin*, 422 U.S. at 499.

[2] Although the Brief of the United States as *Amicus Curiae* suggests that Appellant Orechio (President of the New Jersey Senate, 200th Legislature) "has not indicated any interest in pursuing the appeal before this Court," United States Br. 9 n.5, Appellant Orechio, in fact, retains his status as an Appellant in this case. However, because "his status is indistinguishable from that of Appellant Karcher," we will refer, in our arguments on standing, only to Appellant Karcher.

fendant is at issue. Thus, this is not a case in which a grant of standing will unnecessarily expand access to the federal courts. *Cf. Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974). Moreover, unlike the typical case, a denial of standing will not serve the purposes of judical self-restraint vis-a-vis the other branches of government, see *Warth*, 422 U.S. at 500-501. To the contrary, the judicial authority of the United States has already been exercised by the courts below. If this Court now simply refuses to act because of a perceived deficiency in Defendant Karcher's standing, it will leave in place the decision of a federal court invalidating a state statute. Given the usual presumption of the validity of state legislative actions, *Clements* v. *Fashing*, 457 U.S. 957, 963 (1982) (plurality); *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), this Court should not decline to review the decision below—and thereby de facto declare this law invalid—unless it is clear that any decision in this case now would violate Article III.

Finally, equitable considerations demand that this Court not decline to review the decision below, absent constitutional obstacles to Appellants' standing. If Appellant Karcher had prevailed in the court of appeals (so that the statute was upheld), and Appellees brought this appeal to this Court, the fact that the leadership of the current New Jersey legislature had no interest in defending the statute would not require this Court to declare the statute unconstitutional. Certainly, in that situation, Appellees would not urge that the case be dismissed for want of standing. To the contrary, this Court would invite or permit someone to defend the statute. *Cf. Bob Jones University* v. *United States*, 461 U.S. 574 (1983); J.S. App. 99a-100a. The result should not be different when the statute has been struck down judicially—but not repealed legislatively—at least when representative individuals who meet the minimal constitutional standing requirements are available to defend the law against constitutional attack. See L. Tribe, *Ameri-*

can Constitutional Law, 114 (dismissal for lack of standing "seems appropriate only when the court concludes that there are insurmountable obstacles to identifying the absent but legally relevant interests and securing adequate advocacy of those interests") (footnote omitted).

2. Unlike the present case, all of this Court's major standing cases have focused on the standing of the plaintiff to invoke Article III jurisdiction.[3] Here, the Appellees are asserting their right to bring this litigation into federal court and then win by default because the defendants no longer possess standing to defend the statute.

Although the case law concerning a defendant's standing is sparse, what there is supports Appellants' right to defend this statute. For example, in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), there existed a genuine controversy, with concrete injury in fact. If the legislative veto provision was constitutional, then Chadha would be deported; if the veto provision was unconstitutional, then he would not be deported. But both parties to the lawsuit, the INS and Chadha, took the same position on the constitutionality of the legislative veto. Rather than allow the statute to be struck down because of the lack of a proper defendant, the United States House of Representatives and Senate were permitted to intervene (as defendants) to defend the Act's constitutionality.

Similarly, in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), there was a genuine controversy over the validity of the IRS regulations at issue, but neither of the named parties would take the position that the IRS regulations were valid. This Court appointed outside counsel for the specific purpose of pro-

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[3] See, *e.g.*, *Valley Forge Christian College*, 454 U.S. 464 (1982); *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Flast* v. *Cohen*, 392 U.S. 83 (1968).

viding a party who would defend the validity of the regulations.

For the reasons set forth below, we believe that Appellant Karcher meets the constitutional standing requirements—even for a plaintiff. However, we also submit that the standing rules are, and should be, more lenient for a party who merely defends the state action in question and thus, *a fortiori*, Karcher has standing in this case.

3. "[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). The "irreducible minimum" Article III requirement is simply that the party in question demonstrate "that he personally has suffered some actual or threatened injury," *Gladstone* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979); *Valley Forge*, 454 U.S. 464, 472 (1982), and that the injury "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Thus, the "gist of the question of standing" is whether the party in question has "alleged such a personal stake in the outcome of the controversy [*i.e.*, "injury in fact"] as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); see *Bender* v. *Williamsport Area School District*, 106 S. Ct. 1326, 1332 (1986); *Valley Forge*, 454 U.S. at 472. Appellant Karcher clearly meets these constitutional standards.

Despite his loss of status as Speaker of the current New Jersey General Assembly, Karcher should be permitted to continue to defend the statute as representative of the 200th legislature—the body that enacted the statute at issue. At the very least, Appellant Karcher, as a

representative of the 200th legislature, has a direct stake in preventing the legislature's vote in favor of the statute from being invalidated in federal court (or in any other way) without resort to the legislative process.[4] If—as a general matter—the legislative branch has a sufficient interest in protecting its enactments to confer standing on the legislature to defend a statute when the executive branch refuses to do so, see *Chadha*, 462 U.S. at 935-36, there is no reason to suppose that the interest of the legislature that intervened in this litigation has lessened through the passage of time. The 200th legislature possesses the same personal, professional and reputational interest in defending its legislative acts as the United States Congress did in *Chadha*. That interest is sufficient to support a finding of injury in fact that provides standing to defend an act of that legislature that is declared unconstitutional. See *Meese* v. *Keene*, 107 S. Ct. 1862 (1987).[5]

Appellees do not claim that the Third Circuit's holding—that the 200th legislature acted unconstitutionally—did not injure Appellants' interest as the leadership (and representatives) of that body. Instead, they argue that allowing Karcher such standing is impermissible because it is "self evident" that the current legis-

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[4] Appellees' analysis fails to address the distinctions between the legislative positions involved here, which in essence represent the legislative body itself, and the fluid and individualistic executive branch positions that formed the basis of the development of the law on substitution of parties upon which Appellees rely.

[5] We are *not* suggesting that any individual legislator would have a sufficient interest at any time to defend any statute. The only issue is whether, and under what conditions, a subsequent legislative leader can nullify the "interest" of the previous legislature in a way that destroys standing. The current leadership—unlike Karcher and the 200th legislature—has the political opportunity to repeal the statute if it chooses (and if it can garner the votes). See, *infra*, p. 7. But, if this Court simply dismisses this appeal for lack of standing, Karcher lacks any political remedy, since reenactment of the statute is not a realistic possibility in light of the existing Third Circuit ruling.

lature (and not the 200th legislature) must have plenary control over this litigation. Appellees' Br. 12. But that proposition is far from evident. If, in fact, the 200th legislature had a sufficient interest to be allowed to intervene to defend the statute at the outset of this case, see *Chadha*, 462 U.S. at 935-36, there is no basis in reason or logic to conclude that the legislative interest has diminished simply because the litigation has spanned more than one legislative session.

Appellees also argue that permitting this litigation to continue under Appellants' theory of standing would undermine the will of the current legislature in favor of "dead hand control" by the 200th legislature. Appellees' Br. 12. But, granting Karcher standing in this Court in no way undermines or threatens the authority of the current legislature. If the current State legislative majority disagrees with the 200th legislature's decision to enact the moment of silence statute, it may express its disagreement and discontinue this litigation, at any time, simply by repealing the statute. Repeal—not manipulation of this litigation—is the appropriate action if, in fact, the current legislative majority disagrees with Appellant Karcher. Indeed, under our system of federalism, this Court should not allow itself to be used to achieve State aims which the State legislature itself is unwilling or unable to undertake. The fact that the State legislature has chosen not to take any steps to repeal the moment of silence statute indicates, at the very least, that it has acquiesced in the "dead hand control" of this issue exercised by the 200th legislature.

Finally, when measured against the underlying *purposes* of the Article III "injury in fact" requirement, Karcher's standing as a representative of the 200th legislature is clear. As described by this Court, the Article III requirement of a "case or controversy" has several purposes. The standing requirement (1) assures that issues are decided "in a concrete factual context conducive to a realistic appreciation of the consequences of

judicial action," *Valley Forge*, 454 U.S. at 472; (2) limits the precedential scope of the decision to the "actual factual setting" in which it is decided, *id.*; (3) ensures that federal judicial power will only be invoked by those with a direct stake in the outcome, *id.* at 473; *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973); (4) guards against "unnecessary" exercise of federal judicial power out of deference to the role of the "representative" branches of government and the private individuals affected by the exercise of federal judicial authority, *id.* at 473; *Schlesinger* v. *Reservists*, 418 U.S. at 222. A finding that Karcher has standing to continue to defend the moment of silence statute would be consistent with all of these recognized purposes of the standing doctrine.

First, because Karcher's standing was unchallenged at the time he intervened and at the time of trial, it is plain that the record upon which this appeal will be decided was developed with that "concrete adverseness which sharpens the presentation of the issues . . . ." *Baker* v. *Carr*, 369 U.S. at 204. Thus, any decision by this Court will be confined to the "actual factual setting" of this case, thereby satisfying the second standing requirement. Third, there is no doubt that Karcher and the 200th legislature (both at the time of intervention and presently) have a direct stake in the constitutionality of the New Jersey statute. See, *supra*, 6. Finally, a denial of standing in this case will not serve the purpose of avoiding "confrontation" between the federal judicial authority and the "representative branches." See *United States* v. *Richardson*, 418 U.S. at 188. To the contrary, if this Court simply refuses to act on the merits now, it will leave in effect the decision of a federal court invalidating a presumptively valid state law. Accordingly, every one of the underlying purposes of the standing doctrine identified by this Court would be advanced by permitting Karcher, in the unique circumstances of this case, to continue to defend the statute in his capacity as representative of the 200th legislature.

4. *If* this Court concludes that Appellants lack standing, under Article III, to continue to defend the New Jersey statute at issue, then the proper course for this Court is not simply to dismiss the appeal but instead to vacate the judgments below and remand with instructions to dismiss the complaint. *United States* v. *Munsingwear*, 340 U.S. 36, 39-40 (1950); *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267-268 (1936); *United States Dept. of Treasury* v. *Galioto*, 106 S. Ct. 2683, 2686 (1986); *Burke* v. *Barnes*, 107 S. Ct. 734, 737 (1987).

In *Munsingwear*, the United States, as plaintiff, argued that the defendant was not entitled to a res judicata defense to the remaining count of a complaint where, after entry of judgment on the first count, the case became moot, thereby precluding appeal from that judgment. The United States contended that it would create an unusual hardship to force the government to accept the binding effect of a judgment where a change in circumstances prevented the government from challenging that judgment on appeal. This Court held that no such hardship was created because

> [t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

340 U.S. at 39 (footnote omitted). The Court explained that this "procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by happenstance." *Id.* at 40.[6] Because the United States failed

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[6] The Court in *Munsingwear* noted that the procedure of vacating any judgment which becomes moot on appeal is not merely an option but is the "duty of the appellate court." *Id.* at 40 (quoting

to move to vacate the judgment below once it became clear that jurisdiction in the appellate court was lacking, the Court held that application of res judicata was permissible.

The principles enunciated by this Court in *Munsingwear* clearly are applicable to the present case. Because of the "changed situation"—not attributable to any of the parties—this Court's Article III jurisdiction over this controversy has been called into question, *cf. Duke Power*, 299 U.S. at 268. If this Court concludes that jurisdiction is lacking because of the change in Karcher's official status, the appropriate response under the *Munsingwear* doctrine is to vacate the judgment below and thereby prevent that "unreviewable" judgment from "spawning any legal consequences." *Munsingwear*, 340 U.S. at 41.[7]

Moreover, in light of the strong presumption that a duly enacted state statute is constitutional, *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962); see, *supra*, 3, this Court has a particular obligation not to leave in effect a judgment declaring a state law invalid after that judgment becomes unreviewable for jurisdictional reasons. The existence of an Article III controversy in the court of appeals simply is insufficient to sustain the judg-

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Duke Power, 299 U.S. 259, 267). Such a procedure preserves the rights of all of the parties and prevents any party from being prejudiced by an unreviewable judgment "spawning . . . legal consequences." *Munsingwear*, 340 U.S. at 40-41.

[7] The fact that the change in circumstances in *Munsingwear* involved "mootness" and the change in circumstances in this case allegedly involves "standing" is logically and legally irrelevant. In both cases, factors extrinsic to the litigation resulted in a federal appellate court being deprived of Article III jurisdiction and rendered the judgment below unreviewable. The requirement that the judgment below be vacated to clear the path for relitigation of the issues and to eliminate any consequences of the unreviewable judgment is the same in both cases.

ment below if jurisdiction is lacking in this Court. See *Burke*, 107 S. Ct. at 736 ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing"). Therefore, if this Court concludes that it lacks Article III jurisdiction over this controversy because of the change in Karcher's legislative status, the appropriate action is to vacate the judgment and remand to the court of appeals so that it may remand to the district court with instructions to dismiss the complaint. *Munsingwear*, 340 U.S. at 41.

II.

Appellees, in their argument on the merits, rely primarily on extrinsic evidence of the intent of individual members of the New Jersey Legislature to assert that the "actual purpose" of the moment of silence statute was to endorse or approve religion. Appellees' Brief, 26, 13-28. Appellees' argument, like the decision below, applies an improper legal standard for analysis of legislative "purpose" under the Establishment Clause and overlooks the clear legitimate purposes of the statute.

1. Appellees incorrectly assert that the purpose prong of the *Lemon* test is violated if it can be established that the "primary" or "actual" purpose of the statute is to endorse or advance religion, even if the statute on its face has a legitimate secular purpose. Appellees' Br. 13; Appellees' Supp. Br. 1. This simply is an incorrect statement of the law. It was not the job of the courts below [8]

[8] The court of appeals affirmed as "not clearly erroneous" the finding of the district court that the "statute, although facially neutral, had a religious and not a secular purpose." J.S. App. 26a. The district court's conclusion that the statute had "no overwhelming secular purpose" and an "essentially religious purpose" (J.S. App. 91a-92a) was based primarily on expert trial testimony establishing that the "silent minute has no legitimate pedagogical

to attempt to divine the "actual" legislative motivation or purpose of the New Jersey statute at issue—assuming that such a single purpose could be ascertained.

To the contrary, this Court repeatedly has instructed that the proper analysis under the "purpose" prong of the *Lemon* test is to determine whether the statute has *any* legitimate secular purpose.[9] *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1362 (1984). "Th[is] Court has invalidated legislation . . . on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations." *Lynch*, 104 S. Ct. at 1362 (emphasis added); *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2490 ("even . . . a statute that is motivated in part by a religious purpose may satisfy the first criteria")

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value" (J.S. App. 27a), evidence regarding the history of allegedly "related" legislation and hearsay reports of the comments of *five* New Jersey legislators. J.S. App. 69a-70a.

[9] This is not to say that any articulated purpose is immune from scrutiny. The Court clearly has the authority to inquire if a purported legislative purpose is a sham. See *Edwards* v. *Aguillard*, 107 S. Ct. 2573, 2579 (1987); *Stone* v. *Graham*, 449 U.S. 39, 41 (1980); *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2500 (O'Connor, J., concurring). But the "inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited," *Wallace*, 105 S. Ct. at 2500, and certainly should not involve attempts to derive the purpose of the legislation from after-the-fact testimony of interested persons and newspaper reports about statements by a handful of legislators. *Id.*; see *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *McGowan* v. *Maryland*, 366 U.S. 420, 466 (1961).

Nor is a "primary purpose" test necessary to ensure that statutes do not establish religion. If a statute's preeminent purpose is to promote religion, then the statute undoubtedly will have the effect of promoting religion in a manner that will fail the effects prong of the *Lemon* test. But, if the statute is facially neutral and has no impermissible effect, then searching judicial inquiry into legislative motives, such as that engaged in by the courts below, is wholly unwarranted. See *Wallace*, 105 S. Ct. at 2494 (Powell, J., concurring); *Id.* at 2500-2501 (O'Connor, J., concurring).

(citing *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring)); see also *Stone* v. *Graham*, 449 U.S. at 41; *Epperson* v. *Arkansas*, 393 U.S. 97, 107-109 (1968); *Engle* v. *Vitale*, 370 U.S. 421, 424-425 (1962).

Edwards v. *Aguillard*, 107 S. Ct. 2573 (1987), on which Appellees place substantial reliance, is not to the contrary. In *Edwards*, this Court invalidated the Louisiana Creationism Act only after finding "no clear secular purpose" for the Act. *Id.* at 2578. Indeed, the Court noted that both courts below were "unable to discern an *arguably valid* secular purpose." *Id.* at 2583 n.15 (emphasis added). This contrasts sharply with the decisions below in which the courts discerned at least two secular purposes for the New Jersey statute, but nevertheless struck the statute down on the basis that they discovered an "actual" sectarian purpose.

In short, the New Jersey moment of silence statute must be upheld "[e]ven [if] the benefits to religion [are] substantial" as long as there is a legitimate (non-pretextual) secular purpose for the statute. *Lynch*, 104 S. Ct. at 1362; see *Wallace v. Jaffree*, 105 S. Ct. at 2494 ("We have not interpreted the first prong of *Lemon* . . . as requiring that a statute have 'exclusively secular' objectives") (Powell, J., concurring). Such an analysis is motivated by this Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983). By contrast, the Appellees' proposed analysis would require this Court to "balance" various legislative purposes to determine the "primary" or "actual" purpose of the statute.[10]

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[10] The searching inquiry advocated by the Appellees certainly would be the death knell of any state attempt to accommodate religious interests because any analysis of statutory purpose that "[f]ocus[ed] exclusively on the religious component of any ac-

2. New Jersey's moment of silence statute has at least two clearly discernible secular purposes. First, the statute serves the purpose of providing a moment "for quiet and private contemplation or introspection" which serves the "solely secular ends" of "fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline." *Schempp*, 374 U.S. at 280 (Brennan, J., concurring). The New Jersey statute by its terms simply provides a moment, at the outset of the school day, for uninterrupted reflection and quiet solitude; there is nothing inherently religious or coercive about this practice. One of the many benefits of such a moment of reflection is that it serves the pedagogical function of providing a "boundary" between school and non-school activities. However, even if the moment of silence served no pedagogical purpose, the New Jersey Legislature certainly was entitled to conclude that the secular benefits (to individual students and teachers) outweighed the costs and inconvenience of a moment of silence. The fact that the courts below disagreed with this legislative judgment [11] simply is irrelevant to a proper constitutional analysis.

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tivity would inevitably lead to [the statute's] invalidation under the Establishment Clause." *Lynch*, 104 S. Ct. at 1362; see *Wallace* v. *Jaffree*, 105 S. Ct. at 2494 (Powell, J., concurring).

[11] The district court's rejection of the statute's legitimate pedagogical purpose, which was upheld by the court of appeals, "relied heavily on evidence [*i.e.*, expert testimony] suggesting that the silent minute has no legitimate pedagogical value." J.S. App. 27a. Not only did the courts below "second guess" the educational value (and facially neutral purpose) of the statute, the district court expressed skepticism over the fact that the legislature did not retain an expert to testify concerning the pedagogical value of the moment of silence until after this litigation was initiated. J.S. App. 83a. The court's challenge to the New Jersey legislature's judgment as to the value of this statute—and the suggestion that a state legislature must develop evidence to support its legislative judgment—is completely unprecedented.

The second discernible legitimate purpose of the moment of silence statute was recognized by the court below: to accommodate those students who would use the moment of silence to engage in prayer. See *Jaffree*, 105 S. Ct. at 2498-2499 (O'Connor, J., concurring); *id.* at 2493, n.2 (Powell, J., concurring); *id.* at 2508 (White, J., dissenting). The Court has long recognized that a state legislature may act to "accommodate religious practices and that it may do so without violating the Establishment Clause." *Corporation of Presiding Bishop* v. *Amos*, 107 S. Ct. 2862, 2867 (1987); see *Zorach* v. *Clauson*, 343 U.S. 306 (1952); see also *Hobbie* v. *Unemployment Appeals Comm'n*, 107 S. Ct. 1046, 1051 (1987). "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos*, 107 S. Ct. at 2867 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)). Thus, a desire to accommodate individual students by providing them with a moment for voluntary silent prayer is a permissible purpose under the Establishment Clause.

Appellees argue that this statute cannot be upheld as a permissible accommodation for several reasons. First, Appellees argue that the purpose of accommodating school children was never raised or considered by the parties or courts below. Appellees' Br. 34. Appellees are incorrect. According to the court of appeals, the district court concluded that the legislative purpose in enacting the moment of silence statute was religious "at least to the extent of requiring school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day." J.S. App. 27a-28a. Moreover, the court of appeals held that a finding that the purpose of the statute was "to encourage prayer" rather than "to accommodate those wishing to pray" could not be sustained. *Id.* at 28a-29a. In view of this clear finding by the court of appeals that the purpose

of the statute was to accommodate religious beliefs, the court of appeals' conclusion that the statute lacked a "secular purpose" was erroneous.[12]

Second, Appellees argue that an "accommodation purpose" is impermissible if government intervenes *only* "to facilitate a religious practice"—rather than to "eliminate some obstacle to free exercise" or assure "even handed treatment to religion." Appellees' Br. 34-35. However, this Court has long made clear that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. Thus, Appellants need not show that the accommodation is "necessary" in any sense; see *Zorach* v. *Clausen*, 343 U.S. at 314; see also Br. of United States as *Amicus Curiae*, 22-23. Instead, the state legislature is free to "facilitate the opportunities of individuals to practice their religion" so long as the means chosen do not advocate or promote a religious practice. *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *Lynch* v. *Donnelly*, 104 S. Ct. at 1364-1365.[13] New Jer-

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[12] The court of appeals concluded that "[a] purpose of accommodating the religious beliefs of some students is itself a religious purpose." J.S. App. 28a. But this Court has never held that a purpose to accommodate religious practices is impermissible. In fact, the law is to the contrary. See *Amos*, 107 S. Ct. at 2868-2869; *Gillette* v. *United States*, 401 U.S. 437, 453-54 (1971).

[13] Even in cases that do not involve accommodation, this Court has never required the government to demonstrate that the challenged action is "necessary" to achieve the government interest at issue, as it would if a heightened standard of review—rather than a rationality standard—were applicable. For example, in *Lynch* v. *Donnelly*, this Court held that the fact that the "City's objectives could have been achieved without including the creche in the [City's Christmas] display" was "irrelevant" to the Establishment Clause analysis. 104 S. Ct. at 1363 n.7.

If, in fact, it were necessary to prove that the accommodation in question "lift[s] a government-imposed burden," *cf. Jaffree*, 105 S. Ct. at 2504 (O'Connor, J., concurring), Appellants could never-

sey's statute is facially neutral and therefore permissible under that standard.

Finally, Appellees argue that the moment of silence is an impermissible accommodation because it does not accommodate *all* religious interests, specifically the interests of those "whose prayers require action and/or sound." Appellees' Br. 38. But, this Court has never held that efforts at accommodating religion must achieve the virtually impossible task of simultaneously accommodating every conceivable religious belief. Instead, this Court has only required that legislative action be free of hostility towards all faiths. *Lynch*, 104 S. Ct. at 1364-1365; *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Because the moment of silence law is religiously neutral and non-coercive, it is an acceptable means of religious accommodation. Moreover, as the court of appeals correctly noted, it is the compulsory attendance law, not the moment of silence statute, that inhibits the religious practices of those "whose prayer must be oral or otherwise self expressive." J.S. App. 19a.[14]

3. Appellees suggest that, even if the moment of silence law has a permissible purpose, it must be struck

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theless make such a showing. Although it may be "possible"—in the strictest sense—to pray during lunch, in the playground or in the classroom, the potential for distraction or embarrassment is substantial. Aside from the statute at issue, there is at present no requirement that any time be set aside in the school day for contemplative activity. Thus, the moment of silence alleviates a situation where the state itself, through compulsory attendance laws, has created a regimented environment that burdens religious exercise. See *Marsh*, 463 U.S. a 812 (Brennan, J., dissenting).

[14] If there are religious groups or individuals in the New Jersey public school system who do not recognize silent prayer as at least one acceptable form of prayer, the Appellees have not identified them. It is in fact likely that the issue raised is purely hypothetical because all major religious faiths recognize silent prayer as an acceptable form of prayer. See C. Whittier, *Silent Prayer and Meditation in World Religions* 7 (Cong. Research Service 1982).

down because it has the "direct and immediate effect of advancing religion." Appellees' Br. 28. However, there is no evidence that, under the standards set forth by this Court, the moment of silence has an impermissible effect.

The moment of silence law is neutral among religions. See *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). A moment of silence is not coercive; it does not force any individual student to compromise his beliefs. See *Jaffree*, 105 S. Ct. at 2491-2493. In addition, a moment of silence does not convey a message of government endorsement or approval of religion. *Jaffree*, 105 S. Ct. at 2498-2499 (O'Connor, J., concurring); *id.* at 2493, n.2 (Powell, J., concurring); see *Lynch*, 104 S. Ct. at 1369-1370.[15] "By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the silent period." *Jaffree*, 105 S. Ct. at 2499 (O'Connor, J., concurring). The court of appeals thus correctly concluded that the moment of silence statute at issue here has no impermissible effects. J.S. App. 22a.

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[15] Appellees argue that some teachers "would likely use" the moment of silence to pray and that the "public perception" of the statute might cause "some children [to] pray because of the perceived message from . . . the moment of silence exercise." Appellees' Br. 29-33. But the statute, on its face, is neutral in operation and there is nothing—other than Appellees' speculation—to suggest that a simple moment of silence would have any impermissible effect. See *Jaffree*, 105 S. Ct. at 2498-2499 (O'Connor, J,. concurring); *id.* at 2495 n.9 (Powell, J., concurring). If Appellees were concerned about how the moment of silence statute would operate in practice, they should have waited and challenged the statute as-applied. Any problems that might derive from the misuse (or misunderstanding) of the New Jersey moment of silence statute properly should be addressed at the time, and in the particular factual setting, in which they arise.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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